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August 7, 2003

Peter G. McCabe
Secretary
Standing Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

Please refer this proposal for amendment to Rule 4(c)(1) of the Federal Rules of Appellate Procedure to the Advisory Committee on Appellate Rules.

Rule 4(c)(1), which was enacted to codify the "prisoner mailbox" rule first pronounced by the Supreme Court in *Houston v. Lack*, 487 U.S. 266 (1988), provides:

If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Fed. R. App. P. 4(c)(1).

The focus of this proposal is the Rule's concluding sentence, which concerns the showing of "timely filing" through submission of either a § 1746 declaration or a notarized statement. The apparent basis of this provision is Rule 29.2 of the Supreme Court Rules. *See* Fed. R. App. P. 4(c), 1993 Advisory Committee Note ("The language of the amendment is similar to that in Supreme Court Rule 29.2"). The relevant portion of Rule 29.2 provides:

If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid.

As the Advisory Committee Note indicates, Rules 4(c)(1) and 29.2 have similar language. They each mention a § 1746 declaration or a notarized statement setting forth the date of deposit and stating that first-class postage has been prepaid. However, the Rules differ in one significant respect: it is clear that an inmate must submit one of the mentioned documents to receive the benefit of Rule 29.2, but it is not so clear whether he must do so to receive the benefit of Rule 4(c)(1). See Fed. R. App. P. 4(c)(1) ("Timely filing *may* be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.") (emphasis added). Rule 4(c)(1) arguably does nothing more than create a "safe harbor" for those inmates who submit a § 1746 declaration or a notarized statement containing the requisite content. The Advisory Committee Note provides no explanation as to why the Committee took this particular approach.

In a perfect world, each and every inmate would be astute enough to take advantage of Rule 4(c)(1)'s "safe harbor" by attaching a § 1746 declaration or a notarized statement to his notice of appeal. It would then be simple for a court of appeals to verify that the inmate deposited the notice in the institution's internal mail system on or before the last day for filing. Unfortunately, however, inmates routinely neglect to accompany their notices with either of the mentioned documents, leaving the courts of appeals to determine on a case-by-case basis whether the inmate will nevertheless receive the benefit of the Rule.

Because Rule 4(c)(1) provides the courts of appeals with no guidance on how to proceed in the absence of a § 1746 declaration or a notarized statement, it is not surprising that divergent approaches have emerged, including several within the same circuit. The Sixth and Eighth Circuits, construing the submission of a § 1746 declaration or a notarized statement as mandatory, have dismissed appeals on the basis that the inmate failed to satisfy his burden of establishing the existence of appellate jurisdiction. See *United States v. Streck*, Nos. 01-6087, 01-6089, 2003 WL 1518639 (6th Cir. Mar. 20, 2003) (unpublished disposition); *Portia v. Norris*, 251 F.3d 1196 (8th Cir. 2002). The consistent practice of the Fourth Circuit, on the other hand, is to remand to the district court for factual findings regarding whether the inmate complied with Rule 4(c)(1). See, e.g., *United States v. Propst*, No. 03-6282, 2003 WL 21652692 (4th Cir. July 15, 2003) (unpublished disposition).

Another approach, employed by both the Eighth and Tenth Circuits, is to forgive the absence of a § 1746 declaration or a notarized statement when other evidence demonstrates that the inmate timely deposited his notice of appeal in the prison mail system. See *Sulik v. Taney County*, 316 F.3d 813, 814 (8th Cir. 2003) (postmark on envelope containing notice of appeal); *Fleenor v. Scott*, No. 01-6233, 2002 WL 725450 (10th Cir. Apr. 25, 2002) (unpublished disposition) (prison mail log); *United States v. Bailey*, No. 99-6250, 2000 WL 309296 (10th Cir. March 27, 2000) (unpublished disposition) (certificate of service).

In an effort to bring about some uniformity, the Committee might consider prescribing a standard approach for the courts of appeals to follow when an inmate seeking the benefit of Rule 4(c)(1) fails to include a § 1746 declaration or a notarized statement with his notice of appeal. A preferable course, however, would be to amend Rule 4(c)(1) to make abundantly clear that an inmate will not receive the benefit of the Rule in that circumstance. Not only would this revision bring Rule 4(c)(1) in conformity with Rule 29.2 of the Supreme Court Rules, it would preserve judicial resources that would otherwise be expended to determine the relevant date upon which the inmate deposited his notice of appeal in the institution's mail system. The burden that the amendment would impose upon an inmate (compelling him to supply a § 1746 declaration or a notarized statement with each appeal) is minimal.

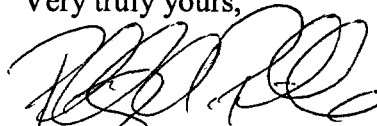
Below is proposed language incorporating the proposed amendment for the Committee's consideration:

If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. ~~If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid. To receive the benefit of this rule, the inmate must:~~

(A) attach to the notice a notarized statement or declaration in compliance with 28 U.S.C. § 1746, either of which must set forth the date of deposit and state that first-class postage has been prepaid; and

(B) use the system designed for legal mail, if the institution has one.

Very truly yours,



Philip A. Pucillo
Assistant Professor of Law